Supreme Court, U.S.
FILED
AUG 15 1980
MICHAEL RODAK, JR., CLERK

No. 79-6027

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

RAYMOND WOOD, EDNA ALLEN and JAMES TANTE,
Petitioners,

vs.

THE STATE OF GEORGIA,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF GEORGIA

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Once a trial judge has determined that probation is the appropriate punishment for a particular offender, and imposes a fine to be paid on installments during the probationary period, may it, consistently with the Equal Protection and Due Process Clauses of the Fourteenth Amendment, revoke the probation of the offender for failure to pay the installments as directed where the evidence established that the offender was indigent and that the offender was not negligent in any manner, and did not deliberately disburse or dissipate monies that resulted in his inability to pay?

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BRIEF OF PETITIONERS, WOOD, ALLEN, AND TANTE ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

Petitioners, Raymond Wood, Edna Allen, and James Tante pray that the opinion and judgment of the Court of Appeals of Georgia be reversed.

OPINION BELOW

The opinion of the Court of Appeals of Georgia is reported at 258 SE2d 171 (1979), and was filed on June 5, 1979, and appears at p. 42 of the Appendix.

JURISDICTION

The judgment of the Court of Appeals of Georgia was entered on June 5, 1979. A rehearing was denied on July 6, 1979. A copy of the denial appears as Appendix "B" to the Petition. Thereafter petitioners filed a Petitioin for Writ of Certiorari to the Supreme Court of Georgia which was denied on September 4, 1979. A copy of the denial appears as Appendix "C" to the Petition. Mr. Justice Powell granted an extension of time to and including February 1, 1980 within which to file a petition for Writ of Certiorari. A timely petition for Writ of Certiorari was duly filed on February 1, 1980, and on May 19, 1980, the petition was granted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourteenth Amendment to the Constitution, and Ga. Code Ann. §27-2901, appear as Appendix "D" to the petition.

STATEMENT

Petitioners were placed on probation after being convicted of distribution of obscene materials. Their cases are reported at 240 SE2d 743, and 240 SE2d 754 (1977). Wood received a ten thousand ($10,000.00) dollar fine and twelve (12) months on probation on each of two (2) counts to run consecutively. Tante and Allen each received a five thousand ($5,000.00) dollar fine and twelve (12) months on probation. (Appendix 11-16)

The remittiturs were made the judgment of the trial court on October 23, 1978. The trial judge, in each probation order, as a condition required each appellant to pay five hundred ($500.00) dollars per month until the fine was paid. (Appendix 17-25)

Thereafter, on January 12, 1979, or approximately 2 1/2 months after being placed on probation, a petition for revocation of probation was filed against each petitioner and the sole ground for revoking the probation was that the petitioner failed to pay as directed. (Appendix 26-31)

A hearing was held on January 26, 1979. Jacqueline L. Tomlin, Edna Allen's probation officer, testified that the petitioner was on unemployment compensation, and that Allen had not paid the $500.00 per month and had no idea how she would raise the fine money. (Tr. 4-6) Upon

questioning by her counsel, Allen testified that she received $64.00 per week or about $250.00 per month, and has no other assets or sources of income. (Tr. 7) Allen is presently having eye trouble, is 54 years of age, and has been turned down for employment. (Tr. 8, 9, 24, 25) She borrowed money to pay for her eye glasses, and has no money left over, after paying expenses, to pay on her fine. (Tr. 9-11)

Gene Odum, James Tante's probation officer, testified that Tante had complied with the conditions of probation except paying the $500.00 per month on the fine. Tante told Odum that his employer was supposed to pay the fine, and that he was on a very tight budget. (Tr. 33) Tante testified he worked for the State of Georgia as a correctional officer. His gross income is $540.00 per month, and he has no other property or income. (Tr. 33, 35) His net pay is $516.00 per month, and he had nothing left over in November and December to pay on the fine. (Tr. 36, 37)

Tante is 60 years of age and was unemployed for eight months and was on unemployment before he obtained his present job. (Tr. 38-40)

Dixon E. Nash, Raymond Wood's probation officer, testified that Wood had not paid the fine as directed. Wood had been terminated from his prior employment, and just started a new job. His gross income is $120.00 per week at his new job. (Tr. 53) Wood's net pay was about $155.00 after deductions on his old job, and he had no money left over to pay his fine. Also, he is the sole support of his wife and three children and his wife is pregnant. (Tr. 54, 55)

The Court issued an Order revoking the probation of all three petitioners on the sole ground that each petitioner violated the terms of probation by not paying the fine as directed, being $500.00 per month or $1500.00 for three months. (Appendix 32-34, 38-41)

SUMMARY OF THE ARGUMENT

The issue presented in this case is simply whether a trial judge may revoke the probation of the offender where he has not paid the monthly installments set by the court due to his indigency.

Petitioners contend that they are denied equal protection of the law as applied since going to prison depends solely on the petitioners' financial ability to pay the fine. The fact that the difference in treatment may be unintended, and results from the judge enforcing a statute which is valid on its face, does not preclude an attack on the court's order on equal protection grounds. *Griffin v. Illinois,* 351 U.S. 12 (1956).

Secondly there is no compelling state interest to collect the fines and imprisonment and imprisonment certainly will not serve the State's interest in the rehabilitation and re[illegible]ha-tion of the three petitioners. The State, through civil process, can always enforce the collection of the fines such as by levy or garnishment. Imprisonment, due solely to their indigency, does not promote the State's interest as all this could accomplish would be to incarcerate all poor people or indigents who cannot pay their fines.

ARGUMENT

1.

THE REVOKING OF PROBATION DUE TO THE FINANCIAL INABILITY OF THE PETITIONERS TO PAY $500 PER MONTH VIOLATES PETITIONERS' EQUAL PROTECTION RIGHTS UNDER THE FOURTEENTH AMENDMENT.

The Court in *Wood, et al. v. State, supra,* relied on *Hunter v. Dean,* 239 SE2d 791 (1977). See also *Barnett v. Hopper,* 217 SE2d 280 (1975) and *Calhoun v. Couch,* 207 SE2d 455 (1974). In *Hunter* the Georgia Supreme Court held that *Tate v. Short,* 401 U.S. 395 (1971), *Morris v. Schoonfield,* 399 U.S. 508 (1970), and *Williams v. Illinois,* 399 U.S. 235 (1970) are limited to their precise facts, and therefore, a defendant may be imprisoned for failure to pay his fine immediately.

It is true that the three Supreme Court precedents are distinguishable from the case at bar. In *Williams v. Illinois, supra,* this Court held that an individual unable to pay a fine could not constitutionally be incarcerated beyond the maximum duration fixed by statute. The Illinois defendant had been sentenced to the maximum confinement and then required to remain 101 days further to satisfy at $5 per day his $505.00 fine and court costs. On the same day this Court in *Morris v. Schoonfield, supra,* vacated a conviction and remanded it for reconsideration in light of *Williams v. Illinois.* Justice White, with three other justices concurring, opined that an indigent could not be imprisoned for failure to pay a fine immediately, regardless of whether this resulted in incarceration for a term longer than the maximum permitted

under statute. This was based on the view that the constitution forbade converting a fine into a sentence due to immediate financial inability to pay. The next term in *Tate v. Short, supra,* this Court adopted the language from the *Morris* case and held that it was unconstitutional to convert a fine into imprisonment for failure to pay a fine immediately.

However, in *Tate v. Short, supra* at 400, this Court stated that:

> "* * * Nor is our decision to be understood as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means; the determination of the constitutionality of imprisonment in that circumstance must await the presentation of a concrete case."

The facts of the present case appears to be the concrete case mentioned in *Tate.*

The Federal courts have followed literally the rule set out in *Tate, supra* at page 400, that:

> "We emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so."

In *U.S. v. Boswell,* 605 F.2d 171 (5th Cir. 1979), the Court held that a revocation of probation was erroneous if defendant did not have the resources available, had no way to acquire them, and was not negligent or deliberate in allowing funds that he had to be disbursed or dissipated in a manner that resulted in his inability to pay. See also *Barnett v. Hopper,* 548 F.2d 550 (5th Cir. 1979), vacated as moot, *Hopper v. Barnett,* 439 U.S. 1041 (1978).

Similarly in *U.S. v. Taylor,* 321 F.2d 339 (4th Cir. 1963),

the Court held that if the defendant was too poor to pay the fines, and was sincere in trying to pay the fines, his probation should not be revoked.

In *U.S. v. Savage,* 440 F.2d 1237, 1239 (5th Cir. 1971) the Court held that a defendant:

> "can not be held to be in violation of the condition (of his parole) unless he is clearly at fault."

The court held that the District Court could not revoke appellant's probation unless it is positively and clearly shown that the failure to meet the condition was due to the appellant's neglect or default.

In *Hensley v. U.S.,* 257 F.2d 61 (5th Cir. 1958), the probation was properly revoked since the defendant had fraudulently transferred assets to avoid the payment of taxes.

Petitioners argue that to imprison a person for financial inability to pay a fine immediately violates equal protection of the law since the sole distinction is one of wealth, and therefore the procedure is invalid, *Frazier v. Jordan,* 457 F.2d 726 (5th Cir. 1972).

Even though the proposition that wealth is a "suspect classification" has been questioned by *San Antonio School District v. Rodriguez,* 411 U.S. 1, 21 (1973), the basic principle of law is sound.

Although this Court has characterized exclusions based upon wealth as "traditionally disfavored." *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 668 (1966), it has stopped short of branding wealth distinctions across the board as "suspect" per se. In *Maher v. Roe,* 432 U.S. 464, 471, fn.6 (1977), this Court made it clear that its restraint on the point has not been exhibited in cases involving the administration of criminal justice but in such areas as "economics and social welfare." *Dandridge v.*

Williams, 397 U.S. 471 (1970) (family ceilings on AFODC payments) *San Antonio Independent School District, v. Rodriguez, supra.* (public school financing); *Maher v. Roe, supra.* (Medicaid expenditures). These are matters which are heavily laden with public policy considerations, which are susceptible to a variety of legitimate approaches, and which require a balancing of diverse interests and priorities. In short, these are areas which are especially within the legislative domain, and are areas in which it would be impossible to decree "absolute equality or precisely equal advantages." *San Antonio Independent School District v. Rodriguez, supra,* 411 U.S. at p. 24.

One must begin with the fundamental principle of *Griffin* that justice must be administered to all persons equally. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin v. Illinois, supra,* 351 U.S. at p. 19.

Decisions following *Griffin* have consistently reaffirmed these fundamental principle of equal justice. *Eskridge v. Washington State Board of Prison Terms,* 357 U.S. 214 (1958); *Douglas v. California,* 372 U.S. 353 (1963); *Lane v. Brown,* 372 U.S. 477 (1963); *Draper v. Washington,* 372 U.S. 487 (1963).

It must be admitted that the equal protection clause does not require "Absolute equality." *Douglas v. California, supra,* 372 U.S. at 357. It is not "a demand that a statute necessarily apply equally to all persons." *Rinaldi v. Yeager,* 384 U.S. 305, 309 (1966), and it permits a state to "provide for differences so long as the result does not amount to * * * an 'invidious discrimination.' " *Douglas v. California, supra,* 372 U.S. at p. 356.

Simply stated the concept of the equal protection of the laws compels recognition of the proposition that persons

similarly situated with respect to the legitimate purpose of the law receive like treatment.

The traditional test has been that the "distinction drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as villative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal." *McDonald v. Board of Education,* 394 U.S. 802 (1969)

This Court has tended to employ a two level test in reviewing legislative classifications under the equal protection clause. In the area of economic regulation, this Court has experienced restraint, investing legislation with a presumption of constitutionality and requiring, merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose. *McDonald v. Board of Education, supra,* 394 U.S. at p. 809.

On the other hand cases involving suspect classifications or touching on fundamental interests this court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. *Skinner v. Oklahoma, ex rel Williamson,* 316 U.S. 535, 541 (1942); *Sherbert v. Verner,* 374 U.S. 398, 406 (1963).

Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose.

In *Williams v. Illinois, supra,* this Court dealt with the equal protection clause in a factual setting very similar to the one now before this court. This court applied the teachings of the Griffin case, since the Illinois statute as applied to *Williams* works on invidious discrimination solely because

he is unable to pay the fine. On its face the statute extends to all defendants an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment. In fact, this is an illusory choice for *Williams* or any indigent who, by definition is without funds. Since only a convicted person with access to funds can avoid the increased imprisonment the Illinois statute, in operative effect, exposes only indigents to the risk of imprisonment beyond the statutory maximum. By making the maximum confinement, contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of statutory maximums applicable only to those without the requisite resources to satisfy the money portion of the judgment. This Court also appears to have concluded that the discrimination inherent in the type of sentence in *Williams* is not necessary to promote such "substantial and legitimate" interest. By pointing to the existence of alternative, less intrusive methods of promoting this interest, this Court in effect demonstrated the lack of necessity. *Illinois v. Williams, supra.*

In this case, as in *Williams,* this court is presented with an example of discrimination between different groups or classifications of convicted criminal defendants—those who are poor and those who are not—or, to put it another way, of discrimination based upon poverty.

Therefore, the instant case involves "suspect classifications" which must be reviewed and evaluated under the stricter standards mentioned in *Skinner v. Oklahoma, supra.* See also *Shapiro v. Thompson,* 390 U.S. 618, 638 (1969); *Sherbert v. Verner,* 374 U.S. 398, 406 (1963).

We next turn to whether imprisonment of an indigent convicted defendant for non payment of a fine is "necessary to

promote a compelling government interest, * * *." *Shapiro v. Thompson, supra,* 394 U.S. at p. 634.

Assuming that the state's interest in the collection of fines and in the reformation and rehabilitation of convicted defendants is "substantial and legitimate" as in *Williams v. Illinois, supra,* the crucial question is whether the practice of imprisoning indigent convicted defendants is necessary to promote either of these interests.

First it would seem absurd that imprisonment can serve the end of enforcing collection of the fine at all in the case before this court. Proper use of imprisonment as a coersive mechanism presupposes an ability to pay. In the instant case we deal with the application of the practice to indigents. Therefore, as applied to indigents, one fails to see how either the threat or the actuality of imprisonment can force a man who is without funds, to pay a fine. *Morris v. Schoonfield, supra,* 301 F. Supp. 158, 163, vacated on other grounds, 399 U.S. 508.

Also since this Court in *Williams* pointed out that the state has available to it alternative procedures for collecting fines, one must conclude that imprisonment of indigents is not necessary to promote this state interest. *Williams v. Illinois, supra,* fn. 21.

Finally is imprisonment permissible because it serves the State's interest in the rehabilitation and reformation of indigent offenders? The argument for imprisonment of an indigent offender whould be that it impresses upon him his responsibility to the county for his criminal behavior. It does not follow, however, that the mere equating of the imprisonment of the indigent who cannot pay a fine with the cash payment of the nonindigent who can, to the end of promoting the rehabilitation of both classes of offenders, compels the conclusion that the treatment of the former is constitu-

tionally permissible. By using alternative methods, and by requiring compliance on the part of an indigent offender with onerous conditions, this should serve to make him aware of his responsibility for his criminal conduct and to encourage him to become a law-abiding citizen.

In summary, the record before this Court shows beyond any contradiction that the petitioners were granted probation and that they were unable to pay their fines and their probation was revoked solely because of their indigency. They incurred imprisonment, not because they refused to comply with the conditions of probation, but simply because they were unable to do so. Although the trial judge had apparently determined that a proper punishment for their offenses did not require incarceration, the petitioners were unable to obtain their freedom only because they were poor.

The inescapable conclusion is that petitioners' probation was revoked due to the inability to pay the fines imposed, and that the imprisonment was not necessary to promote any state interest, and constituted an invidious discrimination based on their poverty in violation of the equal protection clause of the Fourteenth Amendments.

CONCLUSION

In view of the foregoing, petitioners respectfully urge the Court to reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, GLENN ZELL, hereby certify that I have duly served a copy of the foregoing Brief of Petitioners on Hon. Arthur Bolton, Attorney General of Georgia, by placing same in the U.S. Mail properly addressed with adequate postage affixed.

This 22 day of July, 1980.

s/Glenn Zell
GLENN ZELL